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No. 80-644

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

G.D. SEARLE & CO.,
Petitioner,
v.
SUSAN COHN AND WALTER COHN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR BRINCO MINING LIMITED AS AMICUS CURIAE

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

STEPHEN J. POLLAK*
I. MICHAEL GREENBERGER
FRANKLIN D. KRAMER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Brinco Mining Limited
* Counsel of Record

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Respondents.

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MOTION OF BRINCO MINING LIMITED FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Brinco Mining Limited ("Brinco") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amicus curiae, suggesting that the decision below should be reversed.[1]

Brinco is a Canadian corporation with its head office in Vancouver, British Columbia. Since 1953, Brinco has

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[1] Pursuant to Rule 36(3) of the Rules of this Court, Brinco has requested, but has not received, the parties' consent to the filing of the attached brief as amicus curiae.

mined asbestos fiber in northern British Columbia. It has sold that fiber to industrial concerns around the world, including a number of companies in the United States. The purchasers of Brinco's fiber have used that fiber to manufacture a wide variety of asbestos-containing products.

Beginning in 1974, Brinco, along with others, has been named in a large number of products liability suits brought by employees of companies that have purchased asbestos fiber from Brinco. These actions generally allege that the plaintiffs have contracted diseases such as as asbestosis from prolonged exposure to asbestos fiber over a period of many years of employment at asbestos products manufacturing plants. The plaintiffs typically contend that the defendants are liable for failing to warn them of the possible health consequences of exposure to asbestos fiber.[2] To date, approximately 1550 plaintiffs have filed such actions against Brinco in 13 different states. Actions by approximately 325 such plaintiffs are pending against Brinco in New Jersey, whose tolling provision is the focus of the present case.

Brinco sells its asbestos fiber solely in Canada, F.O.B. Vancouver. It has never transacted business within any of the United States and has never designated an agent for service of process upon it in any of the United States. Accordingly, the plaintiffs in the actions brought against Brinco have asserted personal jurisdiction over Brinco on the basis of the so-called "long arm" jurisdictional statutes of the various forum states. Their assertion of jurisdiction on the basis of such statutes has generally been sustained.

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[2] In many of these cases, the plaintiffs assert that their exposure to the defendants' asbestos fiber commenced in the early years of plaintiffs' employment, *i.e.*, in the 1940's and 1950's. These cases therefore in large part turn on conduct of the parties that occurred many years ago.

A significant number of the actions brought against Brinco involve claims the company believes are stale and barred by the statutes of limitation. While the precise events that trigger the running of the statutes of limitation vary from jurisdiction to jurisdiction, Brinco has successfully asserted summary judgment actions on these grounds even in states that follow a liberal "discovery rule" construction of their statutes of limitation.[3]

The ruling of the court below, if sustained by this Court, will greatly affect Brinco's position in the actions pending against it. Brinco is not present in any of the states in which these actions are pending. It therefore will be unable to assert the statute of limitations as a defense in any forum that construes its statute of limitations tolling provision, as does New Jersey, to toll perpetually the statute against a defendant who is not present in the state. In all these states, stale claims that would otherwise likely be barred could be asserted against Brinco if the decision of the court below is not reversed.[4]

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[3] In *DaMato* v. *Turner & Newall, Ltd.*, Nos. 80-2762/3/4/5 (3d Cir., June 22, 1981), for example, the court of appeals affirmed summary judgments in favor of Brinco and others which dismissed as barred by the statute of limitations the claims of four of the first 14 plaintiffs who brought actions claiming damages as a result of their employment at one particular asbestos products manufacturing plant in Pennsylvania.

[4] In addition to the 325 suits pending against Brinco in New Jersey, suits are now pending in several other states that appear to construe their statutes of limitation tolling provisions in a fashion similar to New Jersey. The district court below identified two such states other than New Jersey—South Carolina and Texas—that have construed their tolling provisions in a manner that makes their statutes of limitation unavailable to unlicensed foreign corporations. *Cohn* v. *G.D. Searle & Co.*, 447 F.Supp. 903, 912-13, n.21 (D. N.J. 1978). Other states may be adopting similar constructions. See, *e.g.*, *Dew* v. *Appleberry*, 23 Cal. 3d 630, 591 P.2d 509 (1980); *Duke University* v. *Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895 (1976).

Additionally, absent a reversal in this case, Brinco would have to alter its relationships with many of the states in which its products are distributed. In this regard, Brinco would have to take all steps necessary to be certain that it is sufficiently present or represented within those states to assure that it would not in the future be denied the protections of the statutes of limitation.

In sum, the issues raised by this case are of critical importance to Brinco and to other similarly situated parties. For this reason, and because Brinco believes its analysis of those issues may assist this Court in resolving them, it seeks leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

STEPHEN J. POLLAK*
I. MICHAEL GREENBERGER
FRANKLIN D. KRAMER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Brinco Mining Limited

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

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BRIEF FOR BRINCO MINING LIMITED AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the accompanying motion for leave to file this brief as amicus curiae.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case concerns the constitutionality of a New Jersey statute, N.J. Stat. Ann. § 2A:14-22 (West 1952), which tolls indefinitely certain New Jersey statutes of limitation for purposes of any suit against, *inter alia*, a corporation that is neither organized under the laws of,

nor "represented" within, New Jersey (hereinafter a "foreign corporation").[1] The statute does not define the term "represented," but in *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *appeal pending*, No. 80-629 (U.S. Sup. Ct.), the New Jersey Supreme Court ruled, as a practical matter, that a foreign corporation must obtain a "certificate of authority" to "transact business in" New Jersey to be "represented" in that state for purposes of the tolling provision.[2]

In this action, the defendant moved for dismissal of plaintiffs' complaint on grounds that it was filed two

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[1] Section 2A:14-22 provides:

"If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said section, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

[2] N.J. Stat. Ann. §§ 14A:13-1 *et seq.* (West 1969 & 1980 Supp.) set forth the rights and obligations of foreign corporations under New Jersey law. Section 14A:13-3 provides that "[n]o foreign corporation shall have the right to transact business in this State until it shall have procured a certificate of authority so to do from the Secretary of State."

years after the applicable statute of limitations had expired. C.App. 4a-5a.[3] Plaintiffs opposed the motion by relying on the tolling statute, contending that, although the defendant foreign corporation was subject to New Jersey's long-arm rule, it was nonetheless not "represented" within New Jersey. *Id.* The district court agreed that the defendant was not "represented" within New Jersey, but held that the tolling statute "denies equal protection to foreign corporations amenable to long-arm jurisdiction" and is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. C.App. 47a. The district court also recognized that a foreign corporation would have to obtain a New Jersey certificate of authority to be "represented" within the state for purposes of the tolling statute. It concluded therefore that "since state licensure [of this sort] may not be required of a foreign corporation which is involved in the state solely in interstate commerce, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278, & n.7 (1961)," the New Jersey tolling provision "would [also] run afoul of the [C]ommerce [C]lause" if not overturned. C.App. 45a, n.17. The court of appeals reversed the district court's equal protection holding and held for plaintiffs without addressing defendant's[4] or the district court's Commerce Clause analysis. C.App. 18a-25a.

Amicus endorses the arguments that have been advanced by defendant that New Jersey's tolling statute violates the Equal Protection and Due Process Clauses. Because it is a foreign corporation engaged in New Jersey exclusively in interstate commerce, Brinco is most concerned with and herein addresses only the second

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[3] "C.App." refers to the appendix to the petition for a writ of certiorari filed by defendant G.D. Searle & Co. in this matter.

[4] See defendant's brief to the court of appeals, pp. 33-38.

question presented in this case, whether the statute unduly burdens interstate commerce in contravention of the Commerce Clause. 49 U.S.L.W. 3779 (U.S. Sup. Ct., April 20, 1981).

In Section II, we show how the New Jersey tolling statute effectively compels a foreign corporation engaged exclusively in interstate commerce, and otherwise fully amenable to long-arm service of process, to submit to a burdensome licensing scheme in order to assert important New Jersey statutes of limitation. Next, in Section III, we show that this Court has long held "that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how [meritorious] the pretext may be for imposing it," *Crutcher* v. *Kentucky*, 141 U.S. 47, 58 (1891), and that the right to engage in interstate commerce free of licensure is a "right[] of Constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Because the New Jersey tolling statute bars use of the State's limitations defense as the "price" of exercising the constitutional right to be free of state licensing, that provision violates the Commerce Clause of the United States Constitution.

II. THE NEW JERSEY TOLLING STATUTE COMPELS A FOREIGN CORPORATION TO SUBMIT TO A BURDENSOME LICENSING SCHEME AS A CONDITION OF ASSERTING NEW JERSEY STATUTES OF LIMITATION.

The New Jersey Legislature's purpose in enacting the tolling provision at issue was to prevent certain statutes of limitation from applying in actions in which foreign corporations were unable to be served because of then-existing restrictions on the extraterritorial reach of New

Jersey's service of process rules. See, *e.g.*, *Velmohos* v. *Maren Engineering Corp.*, *supra*, 416 A.2d at 376-77.[5] Despite this purpose, the New Jersey Supreme Court in *Velmohos* held that a corporation is not represented for purposes of the tolling statute even where, as in the instant case, the foreign corporation is, under the New Jersey long-arm rule (see n. 5, *supra*), just as amenable to service of process by a New Jersey plaintiff as is a corporation incorporated or represented within New Jersey.

Under this construction of the tolling statute by the State's highest court, a corporation organized under the

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[5] When the New Jersey tolling provision was originally enacted in 1820 (1820 N.J. Laws 670), the *in personam* jurisdictional power of a state did not extend beyond its borders. See, *e.g.*, *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). At that juncture, the New Jersey provision self-evidently served an important function by tolling statutes of limitation against, *inter alia*, out-of-state corporations which could not be reached by New Jersey plaintiffs. In *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), this Court expanded a state's *in personam* jurisdiction to cover persons beyond the territorial limits of a state who "ha[d] certain minimum contacts with it." As a result of this decision numerous states enacted "long-arm" statutes greatly expanding extraterritorial service of process. Kurland, *The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958).

New Jersey did not adopt its long-arm rule until 1958. N.J. Ct. R. R. 4:4-4(d) (presently N.J. R. 4:4-4(c)). In 1949, when New Jersey amended the tolling provision to its present form, it only tolled the statutes of limitation in actions against out-of-state corporations *not* represented in New Jersey. 1949 N.J. Laws 495. In *Velmohos*, the New Jersey Supreme Court reasoned that, since there was no New Jersey long-arm provision in 1949, the New Jersey Legislature could not have intended that an unlicensed foreign corporation would be represented within New Jersey even though such a corporation is now amenable to service under the long-arm rule promulgated in 1958. As the district court below concluded, "[w]hile the tolling statute made eminent good sense in the days of territorial restrictions on service, it has become dated in the instant context by modern changes in the law of in personam jurisdiction." C.App. 48a.

laws of, or represented within, New Jersey, enjoys completely the repose and certainty afforded by New Jersey statutes of limitation. Foreign corporations, on the other hand, even when fully amenable to service of process under the New Jersey long-arm rule, lose "the right to be free of stale claims," *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944), and "hav[e] to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).[6]

The New Jersey Supreme Court in *Velmohos* recognized the inequities worked by the tolling statute, but concluded "that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 416 A.2 at 378, n.10. The court, however, referred to no New Jersey statute or rule which permits a foreign corporation to designate an agent for service of process within New Jersey without incurring additional in-state obligations.

In fact, no statutory provision allows for such designation on behalf of a foreign corporation except in connection with an application for a "certificate of authority" to "transact business in" New Jersey, pursuant to N.J. Stat. Ann. § 14A:13-4 (West 1969). Obtaining such a certificate of authority, however, automatically requires, *inter alia*, maintenance of a registered business office, N.J. Stat. Ann. § 14A:4-1 (West 1981 Supp.); the filing of annual reports with the New Jersey Secretary of State, *id.* § 14A:4-5 (West 1981 Supp.); and the payment of a New Jersey francise tax, *id.* § 54:10A-2 (West 1981 Supp.) & N.J. Ad. Code § 18:7-1.6 (1979 Supp). More-

[6] Thus, as the district court correctly observed, the New Jersey tolling statute "allow[s] a [New Jersey] plaintiff to postpone indefinitely the assertion of his cause of action even though the defendant [foreign corporation is] subject to service." C.App. 48a.

over, the presence of the registered agent and all of the other accoutrements of this licensing scheme constitute a consent to process that not only subjects the foreign corporation to service by New Jersey plaintiffs, but could make New Jersey a forum in which the foreign corporation might readily be sued by non-New Jersey plaintiffs—perhaps even on causes of action not arising out of the corporation's New Jersey contacts. *See generally Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 444-45 (1952); *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917); *Randolph Laboratories, Inc.* v. *Specialties Development Corp.*, 62 F. Supp. 897 (D.N.J. 1945); *Litton Industrial Systems, Inc.* v. *Kennedy Van Saun Corp.*, 117 N.J. Super 52, 60-62, 283 A.2d 551, 555-56 (1971).

The burdensome nature of this licensing process is underscored by the fact that the "certificate of authority" to "transact business *in*" New Jersey, N.J. Stat. Ann. § 14A:13-4 (West 1969) (emphasis added), was never intended to apply to foreign corporations, such as amicus, whose *only* presence in the State is that its products enter there through the normal channels of interstate commerce. Nor was it intended to apply to the defendant here, which, as the record below clearly shows, merely solicits sales within New Jersey. C.App. 35a. The New Jersey Supreme Court has held expressly that to "transact business in" New Jersey, so as to require possession of a certificate of authority, a foreign corporation must be found to do something more than merely solicit sales there. See, *e.g.*, *Materials Res. Corp.* v. *Metron, Inc.*, 64 N.J. 74, 82-83, 312 A.2d 147, 151-52 (1973). Thus, in order to assert the relevant New Jersey statutes of limitation, a foreign corporation engaged exclusively in *interstate* commerce within New Jersey must obtain a license entailing obligations designed solely for foreign corporations engaging in *intrastate* New Jersey business.

Finally, the burdens on interstate commerce presented by the New Jersey tolling scheme are magnified when they are perceived in a national context. The district court below noted that two states (South Carolina and Texas) in addition to New Jersey have construed their tolling provisions in a fashion which makes statutes of limitation unavailable to unlicensed foreign corporations. C.App. 49a, n.21 (and cases cited therein). See also, *e.g.*, Annot., *Absence As Tolling Statute of Limitations*, 55 A.L.R.3d 1158 (1974). The number of states may even be higher. See, *e.g.*, *Dew* v. *Appleberry*, 23 Cal.2d 630, 591 P.2d 509 (1979); *Duke University* v. *Chestnut*, 28 N.C. App. 568, 221 S.E.2d 895 (1976). Without constitutional protection, corporations engaged in interstate commerce will be forced to incur all of the obligations imposed by licensing schemes in each such state jurisdiction which tolls, or even potentially tolls, statutes of limitation against unlicensed foreign corporations.[7]

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[7] Following the Model Bus. Corp. Act Ann. 2d §§ 110-128 (1971 and 1973 & 1977 Supp.), many States—including California, South Carolina, and Texas, see p. 8, *supra*—have licensing provisions pertaining to foreign corporations similar to those of New Jersey. *Compare, e.g.*, N.J. Stat. Ann. § 14A:13-4 (West 1969) (statutory provision for designation of registered agent by foreign corporation is a part of statutory provision for certificate of authority to transact business), *with* Model Bus. Corp. Act Ann. 2d § 110 (1971); Cal. Corp. Code § 2105 (West 1980 Supp.); S.C. Code § 33-23-20 (1977 & 1980 Supp.); Tex. Bus. Corp. Act Ann. art. 8.05 (Vernon 1980); *and compare* N.J. Stat. Ann. § 14A:4-5 (West 1981 Supp.) (automatically requiring holders of certificates of authority to file annual reports), *with* Model Bus. Corp. Act Ann. 2d §§ 125, 126 (1971); Cal. Corp. Code § 2108 (West 1977); S.C. Code § 12-19-20 (1980 Supp.); Tex. Tax-Gen. Ann. arts. 12.01, 12.08 (Vernon 1969 & 1980 Supp.). *Compare also* N.J. Stat. Ann. § 54:10A-2 (West 1980 Supp.); N.J. Ad. Code § 18:7-1.6 (1979 Supp.) (making holders of certificates of authority automatically subject to franchise tax), *with* Model Bus. Corp. Act Ann. 2d § 133 (1971); S.C. Code §§ 12-19-70, 12-19-130 (1976 & 1980 Supp.); Tex. Tax-Gen. Ann. arts. 12.01, 12.06 (Vernon 1980 Supp.).

III. THE NEW JERSEY TOLLING STATUTE UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE BY CONDITIONING ASSERTION OF STATE STATUTES OF LIMITATION ON SUBMITTING TO NEW JERSEY'S LICENSING SCHEME.

The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. While "[i]n terms, the Clause is a grant of authority to Congress, . . . a long line of cases stretching back to the early days of the Republic . . . has recognized that the [provision] contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & S.L.I. Co.* v. *Board of Equalization*, 49 U.S.L.W. 4542, 4543 (U.S. Sup. Ct., May 26, 1981) (footnote omitted).

It is, accordingly, an age-old and fundamental axiom of Commerce Clause jurisprudence "that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce no matter how [meritorious] the pretext may be for imposing it." *Crutcher* v. *Kentucky*, 141 U.S. 47, 58 (1891). See also, *e.g.*, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 291 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910); L. Tribe, *American Constitutional Law* § 6-13 at p. 342 (1978). Indeed, it has been held that, "[u]nder the authority of the so-called 'drummer' cases, such as *Robbins* v. *Shelby County Taxing District*, [120 U.S. 489 (1887), a foreign corporation] is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State." *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278-79 (1961).

Thus, a foreign corporation engaging exclusively in interstate commerce within a state has a right to be free

of any of that state's licensing requirements. This Court, in turn, has concluded that this kind of right is "of a Constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Giving effect to that right, the Court has frequently invalidated state statutes which required foreign corporations engaged exclusively in interstate commerce to forego their right to sue in state courts as a condition of avoiding state licensing requirements. See, *e.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974) (invalidating statute making the receipt of a certificate of authority a condition to the right to sue in state court);[8] *Dahnke-Walker Mining Co.* v. *Bondurant*, *supra* (invalidating statute making the receipt of a license and agreement that process can be served upon the secretary of state a condition to the right to sue); *Buck Stove & Range Co.* v. *Vickers*, 226 U.S. 205 (1912) (invalidating statute making the receipt of a license, agreement to designate the secretary of state for service of process, payment of a school tax and the filing of a corporation charter a condition to the right to sue). In this regard, state statutes have been struck down even when court access has been conditioned on only minimal infringements upon interstate commerce. See, *e.g.*, *International Textbook Co.* v. *Pigg*, *supra* (invalidat-

[8] In *Allenberg Cotton Co.*, it was stressed that the question whether a state can condition access to its courts on obtaining a certificate of authority was wholly separate from the question whether the state could tax the intrastate aspects of interstate commerce. 419 U.S. at 33-34 ("Whether there were local tax incidents of those contacts which could be reached is a different question on which we express no opinion. * * * We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause.") This distinction is important, because it makes clear that this Court's holdings expanding the states' power to tax the local incidents of interstate commerce are irrelevant to the present controversy. See, *e.g.*, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 111, n.8 (1975).

ing statute making the receipt of a $25.00 license and agreement that service could be effected on secretary of state a condition to the right to sue).

The Court's ruling in *Eli Lilly & Co.* v. *Sav-On Drugs*, *supra*, is of particular relevance. There, the Court, relying upon the cases cited above (except *Allenberg Cotton Co.*, which had not then been decided), declared that "[i]t is well established that New Jersey cannot require [a corporation] to get a certificate of authority to do business [as a condition of engaging in a law suit] if its participation in this trade is limited to its wholly interstate sales." *Id.* at 278-79. This is exactly the condition New Jersey is imposing upon foreign corporations in order for them to be able to assert New Jersey statutes of limitation.

Because of the State's tolling statute, foreign corporations engaged exclusively in interstate commerce within New Jersey and otherwise amenable to service under the State's long-arm rule are required, as a condition of being able to assert the defense of a New Jersey statute of limitation, to forsake their constitutional right to be free of state licensing. To preserve the statutes' protections, they must obtain from New Jersey a certificate of authority. The certificate, in turn, automatically imposes on them obligations of, *inter alia*, continuously maintaining a registered New Jersey office, filing annual New Jersey reports, paying New Jersey franchise taxes, and making themselves amenable to suit within New Jersey by New Jersey and non-New Jersey plaintiffs alike, perhaps even in causes of action that have no relationship to New Jersey. See pp. 6-7, *supra*.[9] Indeed, foreign cor-

[9] This possible consequence of New Jersey's requirement of a registered agent for service of process—that a non-resident defendant engaged solely in interstate commerce might be sued by a non-resident plaintiff on a cause of action not arising in the forum state—may alone be an impermissible burden on interstate com-

[Footnote continued on page 12]

porations engaged exclusively in *interstate* activity must obtain the New Jersey certificate of authority even though, under the plain terms of the relevant New Jersey statutes and cases (see p. 7, *supra*), such a certificate is only required of foreign corporations engaged in *intrastate* New Jersey commerce.

Plaintiffs, in their brief in opposition to the petition for certiorari (at 17), do not deny the burdensome effect of New Jersey's licensing requirements.[10] They instead seek to dismiss *Eli Lilly & Co.* and other like cases on the ground that they only bar the requirement of a license when it is made a condition to a foreign corporation's "right to sue others." Plaintiffs observe (*id.*) "that [defendant] has never contended that it did not have a right to sue in the Courts of New Jersey."

Plaintiffs' attempt to distinguish between the right to sue and the right to assert what may be a dispositive limitations defense is unavailing. This Court has made it clear that "rights of a Constitutional stature," such as "[e]ngaging in interstate commerce," "may not [be] condition[ed] by the exaction of a price." *Garrity* v. *New Jersey*, *supra*, 385 U.S. at 500. See also, *e.g.*, L.

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[9] [Continued]

merce in some circumstances. See, *e.g.*, *Denver & R.G.W. R.R.* v. *Terte*, 284 U.S. 284 (1932); *Michigan Central R.R.* v. *Mix*, 278 U.S. 492 (1929); *Davis* v. *Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923). This restriction on the permissible reach of *in personam* jurisdiction under the Commerce Clause is wholly independent of, and where applicable may be more rigorous than, the limitations imposed by the Due Process Clause. See, *e.g.*, *Davis* v. *Farmers Co-operative Equity Co.*, *supra* at 317-18. Thus the restriction is unaffected by *International Shoe's* expansion of *in personam* jurisdiction under the Due Process Clause. See, *e.g.*, *Scanapico* v. *Richmond, F.&P. R.R.*, 439 F.2d 17, 25-26 (2d Cir. 1970) (en banc) (Friendly, J.).

[10] Indeed, in the district court, plaintiffs recognized the burdensome effect of the tolling statute by contending that it was intended to be "a *penalty* to induce licensure" of foreign corporations in New Jersey. C. App. 44a (emphasis added).

Tribe, *supra*, § 6-13 at pp. 342-343 & n.5. Thus, it is not defendant's burden to demonstrate that the price of foregoing the right to assert a limitations defense is as high as the price of foregoing the right to sue—although amicus believes it clearly is as high.[11] The only question is whether foregoing the protection of the statute of limitations is "the exaction of a price" at all. This Court, in *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), made quite clear that it is, when it said:

> "Statutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' * * * We should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest.' *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938)."

Moreover, the "price" would not be exacted only in New Jersey. Foreign corporations engaged in interstate commerce would lose the protections of applicable stat-

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[11] Indeed, a foreign corporation can immediately overcome the bar to its right to sue upon existing claims by submitting itself to the state's licensing system. See, *e.g.*, *Grow Farms Corp.* v. *National State Bank*, 167 N.J. Super. 102, 400 A.2d 535 (1979) (foreign corporation allowed to obtain certificate during pendency of action, if necessary, in order to avoid motion to dismiss); *Day* v. *Stokes*, 97 N.J. Eq. 378, 127 A. 331 (1925) (certificated foreign corporation may sue on contract executed before certification); *Protective Finance Corp.* v. *Glass*, 100 N.J.L. 85, 2 N.J. Misc. 818, 125 A. 879 (1924) (same). But licensing will *not* automatically entitle a foreign corporation to assert a limitations defense as to pending claims. Instead, as the terms of the tolling statute (N.J. Stat. Ann. 2A:14-22 (West 1952)) make plain, licensing will only commence the *running* of the limitations statute—clearly a "price" which exceeds that found in "the right to sue" context.

utes of limitation in other jurisdictions that have similar tolling provisions unless they submit themselves to the licensing systems of those states. See p. 8, *supra*. In this regard, it must be remembered that service of process under traditional long-arm rules may be obtained in some circumstances upon a foreign corporation even when its product does not enter a state through direct sales, but, instead, finds its way there indirectly long after the product has left the foreign corporation's control. See, *e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Thus, if there is any foreseeable likelihood that a foreign corporation's products will wend their way into a state with a tolling provision similar to New Jersey's, prudence will dictate that all of the obligations inherent in the state licensing systems be incurred in order that relevant statutes of limitation may be asserted.

In sum, the precedents of this Court establish that New Jersey cannot constitutionally condition the availability of its statutes of limitation to foreign corporations engaged exclusively in interstate commerce within that state on their submitting to New Jersey licensing processes. Therefore, the New Jersey tolling statute as applied to these foreign corporations must be invalidated on the ground that it violates the Commerce Clause of the United States Constitution.[12]

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[12] Distinguished from the case at bar are those cases where a state has jurisdiction to regulate foreign corporations because of their involvement in intrastate commerce, see, *e.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) (foreign corporation grows produce intrastate); or because of their desire to be involved in intrastate commerce, see, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (foreign corporation seeking to establish investment advisory service intrastate). In such cases, however, the Court has still invalidated state statutes on Commerce Clause grounds. It has done so either because the statute amounts to "simple economic protectionism" in which case a "virtual[] *per se* rule of invalidity" is applied, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); or because, even though "protectionism" is not

CONCLUSION

For the reasons stated above and in the Brief for the Petitioner, we urge the Court to reverse the decision below.

Respectfully submitted,

STEPHEN J. POLLAK*
I. MICHAEL GREENBERGER
FRANKLIN D. KRAMER
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Brinco Mining Limited

Of Counsel:
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

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* Counsel of Record

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found, "the nature of the local interest" to be protected by the statute "could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. at 142. See also, *e.g.*, *Lewis* v. *BT Investment Managers, Inc.*, *supra*, 447 U.S. at 37; *Hughes* v. *Oklahoma*, 441 U.S. 332, 327 (1979).

Even using the latter and more lenient of these two tests, it is self-evident that the purposes underlying the tolling statute can be accomplished "with a lesser impact on interstate activities" than by abolishing the limitations defense for unregistered corporations whether or not they can be served in New Jersey. Thus, as we have shown, the burdens imposed by the tolling statute on interstate commerce are substantial and the statute's original purpose was addressed to a problem—preserving claims of New Jersey plaintiffs who did not have *in personam* jurisdiction over foreign corporations—has been resolved in New Jersey, as it has in most states, by adoption of a long-arm rule. Whatever problems remain in serving unregistered foreign corporations in New Jersey actions—and the district court quite persuasively demonstrated that there are virtually none (C. App. 47a, n.19)—can readily be addressed by amendments to New Jersey statutes or rules which would ensure that a complaint will not be dismissed in cases where a New Jersey plaintiff is having legitimate difficulties serving a foreign corporation. In sum, even under a balancing test applied to states statutes affecting foreign corporations with intrastate contacts, the tolling statute should still be found to violate the Commerce Clause.